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LEGAL DIVISION - MIC 82

450 N STREET, SACRAMENTO, CALIFORNIA

(P.O. BOX 942879, SACRAMENTO, CALIFORNIA 94279-0001)

Telephone No.: (916) 324-3828

Fax No: (916) 323-3387

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January 17, 1995

Ms. N--- L. G---
F--- E---
P. O. Box XXXX
---, CA XXXXX

Re: [No Permit Number]
Sales of Meals
to Students

Dear Ms. G---:

I am responding to your letter to Assistant Chief Counsel Gary J. Jugum dated October 21, 1994, which you wrote at the suggestion of Mr. Larry Roberts of our San Jose District Office, and our November 23, 1994, telephone conversation on this subject. You ask for advice about the application of tax to your sales of meals and food products to students at D--- College and at S--- F--- C--- College.

You indicate that F--- E--- has a "licensing agreement" with the D--- College Food Service and that, when you recently opened, you were advised that Revenue and Taxation Code section 6363 applied to your sales to students for food and drink consumed on campus. You further indicate that you will be contracting with the Associated Students of S--- F--- C--- College Campus to open an E--- cart in its student union in the near future. You do not describe the food service operation at D--- College, so we assume, for the purpose of this discussion, that it is a sit-down eating place serving meals and food products and possessing table and chairs at which the students may eat the food products and meals which they have purchased. We also assume that the students pay F--- E--- directly, either on a prepaid or an "as-you-go" basis, for their purchases. In our telephone conversation you stated that at S--- F--- C--- College the cart will be located in a general-purpose room. The students use the room for studying and

gathering. In the past, the student have brought their own food and drink into the room when they wanted it. Also, the students will pay F--- E--- directly for their purchases.

OPINION

A. Sales and Use Tax Generally.

In California, except where specifically exempted by statute, Revenue and Taxation Code section 6051 imposes an excise tax, computed as a percentage of gross receipts, upon all retailers for the privilege of selling tangible personal property at retail in this state. (Unless otherwise stated, all statutory references are to the Revenue and Taxation Code.) "[I]t shall be presumed that all gross receipts are subject to tax until the contrary is established. The burden of proving that a sale of tangible personal property is not a sale at retail is upon the person who makes the sale. . ." (§ 6091.) "Exemptions from taxation must be found in the statute." (Market St. Ry. Co. v. Cal. St. Bd. of Equal. 137 Cal.App.2d 87, 96 [290 P.2d 201].) "The taxpayer has the burden of showing that he clearly comes within the exemption." (Standard Oil Co. v. St. Bd. of Equalization (1974) 39 Cal.App.3d 765, 769 [114 Cal.Rptr. 571].)

B. Sales of Meals and Food Products to Students.

Although sales of food products are generally exempt from tax, Regulation 1603 interprets and implements several statutes which provide for the taxation of food sales under certain circumstances. (Sales and use tax regulations are Board promulgations which have the force and effect of law.) Regulation 1603(j) interprets and implements section 6363, in part, as follows:

"Sales of meals or food products for human consumption to students of a school by public or private schools, school districts, and student organizations, are exempt from tax [with an exception not applicable here]."

We have previously determined that, for this exemption from tax to apply, the person selling the meals and food products must be one of the above named entities. In other words, the student must contract with the entity to get the meals. The entity can then hire a third party such as F--- E--- to actually prepare and serve the meals, but the student must contract with the entity to get the meals. Where the entity hires a third party to run the food operation, and the student's sole contact is with the food seller, as when the student pays the seller directly for the food, then the seller is not the entity but, rather, the meal supplier. In this case, then, under the facts as we have assumed them to be, F--- E---, and not D--- College, is selling the meals. Because the exemption in Regulation 1602(j) does not apply to sales by F--- E---, its sales to D--- students are subject to tax.

By the same token, the sales from the E--- cart will be subject to tax also. As I explained over the phone, F--- E--- will be selling foods in a form suitable for consumption in a room

where there is a reasonable relationship between the presence of the cart and the use of the tables and chairs in the room for consumption of F--- E---'s products. One of the current uses of the room is for consumption of food that the students bring in themselves. Therefore, the use of the room to consume F--- E---'s products is not fortuitous but an extension of a current use of the room. The room, tables, and chairs are supplied by the entity with which F--- E--- is contracting – S--- F--- C--- College. (See, Regulation 1603(f).) Its sales will thus be subject to tax unless a statutory exemption applies. As, again, F--- E--- will be selling its products directly to the students, the exemption provided under Regulation 1603(j) will not apply. Its sales will be subject to tax.

For your information, I have included a copy of Regulation 1603. I hope the above discussion has answered your question. If you need anything further, please do not hesitate to write again.

Sincerely,

John L. Waid
Tax Counsel

JLW

Enclosure: Reg. 1603

cc: San Jose District Administrator - GH
Please forward a copy to Larry Roberts.